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Supreme Court of the United States

October Term, 1958

No. 670

MAX PADELL,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice of the United States and the Associated Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed petitioner's conviction in the District Court for the Southern District of New York under Title 18, Section 1462, of the United States Code.

(a) The Opinions Below

No opinion was written in the District Court. The opinion of the Court of Appeals has not yet been reported. A copy is hereto annexed (see p. 11, *infra*).

(b) Statement of Grounds of Jurisdiction

(i) The judgment of the Court of Appeals was rendered and entered on December 31, 1958.

(ii) No application was made for rehearing.

(iii) The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254.

(c) Questions Presented for Review

1. Did the District Court err in refusing to grant a mistrial in view of the clearly manifested lack of understanding of the charge on the part of the jury?

2. Did petitioner have a fair trial when it is evident from statements made by members of the jury that they did not understand the judge's charge and the judge did no more than repeat the language he had previously used?

(d) Statutes Relied On

United States Code, Title 18, Section 1462

Importation or Transportation of Obscene Matters

"Whoever * * * knowingly deposits with any express company or other common carrier, for carriage in interstate * * * commerce,

(a) any obscene, lewd, lascivious or filthy book, pamphlet * * *

Shall be fined not more than $5,000.00 or imprisoned not more than five years or both."

(e) Statement of the Case

Petitioner was charged (4a)* with having shipped a carton of obscene books. In its bill of particulars (5a) the government specified that 25 of the 101 articles were obscene, namely, five copies of each of the books: "Virgins Come High", "Come-On Girl", "Sex Factory", "The Wheel of Violence" and "Celeste".

The trial took place before Judge Bicks and a jury. No witnesses were called, the fact of transportation having been conceded (*G.5a*).** The government introduced the

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* The references are to Appellant's Appendix in the Court of Appeals.

** The references in italics are to the Government's Appendix in the Court of Appeals.

five books into evidence (*G26a*) and read one story from "Sex Factory" (*G28a*). Counsel for petitioner moved to dismiss on the ground, among others, that the books were not obscene as matter of law (*G31a-33a*). That motion was denied, although it appears that the trial court did not read the books (*see G32a*, 18a).

Petitioner also called no witnesses. His counsel read excerpts from the various books and also from three novels he had placed in evidence, "Peyton Place", "Ten North Frederick" and "The Deer Park" (*G52a, 53a, 64a-67a*).

The court thereupon charged the jury substantially in the language approved by this Court in *Roth* v. *United States*, 354 U. S. 476 (12a-16a). After a few hours of deliberation the jury returned and asked to be allowed to look up the definition of obscene in a dictionary. This the judge refused (23a). When the foreman then said that the jury wanted an interpretation of the word "obscene" the judge twice reread his previous charge (25a-27a).

At that point petitioner's counsel (27a) asked the judge to read this Court's language in *Roth* and excepted to the inclusion of the concept of "filthy" as not appropriate under the circumstances.

Several of the jurors still indicated confusion (30a) and petitioner's counsel then moved for a mistrial, which was denied (32a). After about three hours' further deliberation the jury asked if they could convict and yet recommend leniency (33a). This the trial judge said could not be done (33a). Soon thereafter the jury brought in a verdict of guilty (34a).

On June 26, 1958 the Court imposed a sentence of $5,000 fine and costs, a suspended sentence for two years and probation for five (38a).

(f) Jurisdiction of the Court Below

The District Court had jurisdiction of this case under § 1462 of Title 18.

Reasons for Granting the Writ

The decision below is, in actual substance, at variance with the standards laid down by this Court in *Roth* v. *United States*, 354 U. S. 476, and applied in *One, Incorporated* v. *Olesen*, 355 U. S. 371, and *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372, and departs from the requirements of a fair trial as laid down by this Court in *Bollenbach* v. *United States*, 326 U. S. 607, and other cases hereafter discussed.

Since the trial judge originally instructed the jury substantially in the exact language which had been used by the trial judge in *Roth* and has been approved by this Court, petitioner's counsel at the trial took no exception. However, subsequent developments clearly indicated that the jury had not understood that instruction. And the trial judge's only response to the jury's lack of comprehension consisted of repetition of his earlier statement. We do not believe that this constitutes an adequate performance of the function of the trial judge.

It is, of course, elementary that the function of instructions is to make clear to the lay jurors the meaning of the legal concepts which are relevant to the offense charged. That has often proved to be very difficult since the language used by appellate courts is not often suitable for the purpose. The meaning of premeditation in the law of murder has been a continued source of such difficulty. We believe that the meaning of obscenity will soon prove to be an even more fruitful source and that this case well illustrates the problem.

In *Roth* the jury evidently understood the trial judge when he said that the test would be whether the book,

judged as a whole, "would arouse sexual desires or sexual impure thoughts" and "incite prurient interest" in the average person. Here, when the trial judge used the same language (12a), the jury was not satisfied.

After the jury's request for a dictionary was refused (23a) the foreman stated "We would like a further illustration or interpretation of the word [obscene], more defined, more or less" (24a).

At that point there was a duty on the part of the judge, as stated by this Court in *Bollenbach, supra*, to clear away the difficulties of the jury "with concrete accuracy" (326 U. S. at 613). That should be done in a "plain and practical fashion," as said by the New York Court of Appeals in *People* v. *Lupo*, 305 N. Y. 448, 452.

Quoting from *People* v. *Gonzalez*, 293 N. Y. 259, 262, the Court said at page 452:

> "'* * * The very fact that the jury, after having been in consultation, have failed to comprehend the instructions given in the charge * * * is of itself sufficient to show the necessity of additional instructions. * * * if the jury do not understand the instructions, or are ignorant or uncertain as to the law applicable to any part of the case, the charge is inadequate and fails of its purpose'."

and continued:

> "It may well be, as urged upon us, that every sentence that the judge uttered, taken by itself, was an accurate statement of law, but justice and its proper administration demand more. A study of the instructions in their entirety, particularly when considered in the light of the jurors' repeated requests for further enlightenment, reveals that the jury was never given any clear notion of the only real question before it—the elements of the several crimes charged and the alternative verdicts possible. A court's charge is not like a corporate indenture, able to be studied at leisure, valid if all technical recitals are to be found within its four corners. Rather, it

> is a means to guide laymen, in plain and practical fashion, in the discharge of a solemn responsibility. The charge in the case against Lupo served on such function and, accordingly, he is entitled to a new trial."

To like effect is *Commonwealth* v. *Smith*, 221 Penn St. 552—indeed, the language quoted in *Lupo* from *Gonzalez* was taken from the opinion in the Pennsylvania case at page 555.

See also *People* v. *Gezzo*, 307 N. Y. 385, at 394 ff. And that case, we submit, disposes of the contention which was made by the government in the Court of Appeals that the jury was apparently satisfied with the Court's rereading of what it had previously told them:

> "The prosecution maintains that the jurymen were apparently satisfied with the court's instructions since they did not request further instructions although the court informed them that they could do so. The answer to that argument is found in the following language from *People* v. *Gonzalez* (*supra*, p. 261): 'Their question, while not framed in language of the utmost possible clarity, was intelligible and, *even if it were not, it was the court's duty to ask the questioners to make their inquiry clearer.* That there was a binding duty to answer the question cannot be doubted.' (Emphasis supplied.)"

But here that obligation was not assumed by the trial judge. Instead he merely twice repeated the instruction previously given (24a-27a). That, we submit, was an abdication of the responsibility which the judge should have assumed at that juncture.

The jury's difficulty at this point was, moreover, increased by the judge's reading not only what he had originally said with respect to obscenity, but also what he had said with respect to "filthy," although, as counsel pointed out (27a), the books here were charged to be obscene, not filthy (*66a*, 86a). Nowhere in the government's opening

or summation was there any mention of "filthy." And this error was compounded by the injection by the trial court of the concept "excretion" to which specific objection was taken (27a).

Since the case was tried solely on the theory of obscenity it was denial of due process to permit a conviction, which might have rested on the theory of filth. See *Cole* v. *Arkansas*, 333 U. S. 196. And, in *Roth*, this Court recognized that the issues were entirely distinct and "might have been separated" (354 U. S. at 800). Nevertheless the Trial Court treated "obscene" and "filthy" as identical, despite counsel's continued objection (28a, 29a): "the word 'obscene' was sort of a shorthand way of referring to 'obscene, lewd, lascivious or filthy.'"

Two of the jurors continued uncertain (29a, 30a), with the result that petitioner's counsel moved for a mistrial (32a). After that application was denied the jury was evidently still troubled. For a memorandum was sent to the Court at midnight asking whether the jury might convict with a recommendation for leniency (33a). The trial judge, instead of merely saying no, gave an elaborate explanation of the respective roles of court and jury (33a, 34a). Fifteen minutes thereafter a verdict of guilty was brought in (34a, 35a).

We submit that this case falls within the principle of *Bollenbach*, *supra*. While the trial court was here not wrong in its original charge, the other circumstances were so like those there and the total impact on the jury so similar in its effect that the same result, reversal, should follow. For here, as there, the jury had been out many hours, had, late at night, made manifest its desire for further instruction, had been met with no guidance but mere repetition of what it had already said it didn't understand. Here also the jury had on a Friday in June, "the desire to go home and escape overnight detention" (326 U. S. at 612).

When all these elements are taken into account it seems clear that language more readily understandable by the man in the street than that heretofore approved by this Court must be found. Otherwise the fears expressed by Mr. Justice Harlan in *Roth* will be realized and the floodgates of censorship let loose (354 U. S. at 498):

> "* * * I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case."

The importance of a charge that really informs is emphasized by the character of the material introduced in evidence by the prosecution. While the stories all contain heightened descriptions of the allure of the female body and some describe the preliminaries to the sexual act with occasional sadistic elements, there are no actual descriptions of the act itself in any of the stories. Most of them are detective stories in which the sex element is wholly incidental. It is impossible to see how any of the stories in "Celeste", "The Wheel of Violence", "Virgins Come High" or "Come-On Girl" can be considered obscene under the standards laid down by this Court, whatever other opinion one might have of them. A similar type of "detective story publication" was recently held not to be obscene under New York's very broad law on the subject: *Burtman* v. *Silberglitt*, N. Y. L. J., Oct. 25, 1958, p. 12, col. 7. The photographs and illustrations in these booklets are of a rather vulgar kind to which the modern age has long become accustomed and which were also held not obscene in the *Burtman* case.

We can hardly say that it is pleasant for any cultivated person to spend time with this material and therefore hesitate to call on the members of this Court to do so. But, as Mr. Justice Klein of the New York court said in the *Bartman* case:

> "It is not enough that a publication be vulgar, in bad taste, or offensive to standards of refinement or decency."

Cf. *United States* v. *31 Photographs*, 156 F. Supp. 350, at 354.

In a borderline case such as this it is, therefore, particularly important that the dividing line between the permitted and proscribed be indicated by the trial court with sufficient precision to be readily understood by the jury. The instructions in an obscenity case might, indeed, include a reference to the constitutional problem involved and contain a caution about the dangers of censorship. Without such guidance a jury may well consider that society's only interest is protection against violations of the criminal law. As judicial opinions have long noted, there is a countervailing interest in the fullest freedom of expression. And this interest cannot, of course, be limited to forms of ~~expression~~ considered to have literary, artistic or scientific value. The history of culture has all too clearly demonstrated how shifting such values are. This case affords the Court an opportunity for moving forward in this troublesome area.

It is respectfully requested that a writ issue to review the decision below.

Respectfully submitted,

Osmond K. Fraenkel,
Counsel for Petitioner.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

No. 157—October Term, 1958

(Argued December 9, 1958 Decided December 31, 1958)

Docket No. 25326

—o—

UNITED STATES OF AMERICA,

Appellee,

v.

MAX PADELL,

Appellant.

—o—

Before:

CLARK, *Chief Judge*, and
HINCKS AND LUMBARD, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Alexander Bicks, Judge.

Max Padell appeals from his conviction of shipping obscene books in interstate commerce in violation of 18 U. S. C. Sec. 1462.

SIDNEY SCHREIBERG, New York City, for appellant.

HERBERT F. ROTH, Asst. U. S. Atty., S. D. N. Y., New York City (ARTHUR H. CHRISTY, U. S. Atty., and MARK F. HUGHES, JR., Asst. U. S. Atty., New York City, on the brief), for appellee.

PER CURIAM:

Under United States v. Roth, 354 U. S. 476, the jury was entitled to find the dreary pornography here placed

before it obscene within the meaning of the statutory prohibition. 18 U. S. C. Sec. 1462. The trial judge committed no error in repeating his proper and adequate definition of obscenity in response to the jury's question, and his reply to the jury's query as to whether it could recommend leniency was correct. The sentence he imposed was proper and indeed light. The strictures on the trial judge in the appellant's brief are not justified by anything appearing in the record of this fairly conducted trial, and pass the bounds of dignity and good taste.

Conviction affirmed.

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OCTOBER TERM, 1958

MAX PADDEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

Case:

Roth v. *United States*, 354 U.S. 476 ..... 2, 4, 5, 6, 7

497907—59

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 670

MAX PADELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the Court of Appeals (R. 152–153; Pet. App.) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1958 (R. 154). The petition for a writ of certiorari was filed on January 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was given a fair trial when, in response to the jury's request for a further interpretation of the meaning of obscenity, the trial judge

repeated and enlarged upon previously given instructions approved by this Court in *Roth* v. *United States*, 354 U.S. 476, until satisfied that the jury understood this judicially approved standard.

STATEMENT

Following a jury trial in the District Court for the Southern District of New York, petitioner was convicted of shipping obscene books in interstate commerce in violation of 18 U.S.C. 1462 (R. 35). He was sentenced to two years imprisonment and fined $5,000 plus the cost of prosecution. Execution of the prison sentence was suspended and petitioner was placed on probation for 5 years (R. 57–58; 38–56). In a *per curiam* opinion, the Court of Appeals unanimously affirmed (R. 152–153).

1. It was stipulated at the trial that on May 22, 1957, petitioner, knowing the contents thereof, deposited with the ABC Freight Forwarding Corporation, a common carrier, for interstate transportation, 101 books and pamphlets including five copies each of "Virgins Come High", "Sex Factory", "Wheel of Violence", "Celeste" and "Come-on Girl" (R. 86–87). The single issue for the jury was whether these volumes were obscene. No witnesses were called, the government relying solely upon contents of the books which were introduced into evidence (R. 87). Portions thereof were read by counsel to the jury.

2. The pertinent portion of the trial judge's original instructions to the jury was as follows (R. 12–13; 11–16):

"As I have told you before, you must distinguish between sex and obscenity. They are not synonymous. Every book that deals with sex, naturally, is not obscene. Obscene material is material which deals with sex in a manner appealing to prurient interests.

"The matter, the reading matter taken as a whole, the book taken as a whole, any one of them, must be calculated to corrupt and debauch the mind and morals of those in whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts.

"The test is not whether it will arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community, such as the young, the immature, or the highly prudish, or would leave another segment such as the scientific or the highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. It must be such as will excite or incite that prurient interest in the average person in whose hands that material may fall.

* * * * *

"'Filthy', as I said, as used in the statute, must also relate to sexual matters. It is distinguishable from the term 'obscene', which tends to promote lust and impure thoughts. 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and indecent way that it tends to arouse a feeling of disgust and revolt.

"To sum up, a book is obscene if, considered as a whole, its predominant appeal is to prurient interests, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond cus-

tomary limits of candor in description or representation of such matters.

* * * * *

"In other words, you determine its impact upon the average person in the community. The books must be judged as a whole in their entire context, and you are not to consider detached or separate portions in reaching a conclusion."

No exceptions were taken to the charge (R. 20).

The jury retired for its deliberation at 5:19 p.m. At 9 p.m. it made a request for a dictionary (R. 21). Counsel agreed with the judge's view that this request should be denied (R. 23). The court then called the jury into the court room, where the foreman stated that the jurors "would like a further illustration or interpretation of the word" obscene (R. 23–24). Thereupon the judge reread his original charge, *supra,* pp. 3–4 (R. 24–25), and was informed by the foreman that it helped "very much" (R. 26). Juror #9 then asked if it would be permissible to take a copy of what the judge had said into the jury room so that they could "refresh [their] thinking" (R. 26). The trial judge refused this request, but reread the relevant portion of his charge (R. 26–27). Thereupon, petitioner's counsel requested that the court read to the jury some additional language used by this Court in *Roth* v. *United States,* 354 U.S. 476, 488–489. This the trial judge did [1] (R. 29). The judge then inquired if the jury had any further questions and

[1] "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

reread one sentence of his charge upon request (R. 29–30). Asked by juror #6 to define "customary candor", which was used in the charge, the judge explained this term (R. 30–31). When petitioner's counsel objected to the restatement by the judge of the meaning of the word "filthy", the judge noted that he had charged in the language of the *Roth* case; that no objection had been taken to the definition of "filthy" in the original charge; and that he believed that the jury was requesting a definition of "obscene" in the generic sense (R. 28–29).

At 12 midnight the jury submitted the question of whether they were allowed to find petitioner guilty with a recommendation for leniency (R. 33). The judge explained to them that it was their province only to determine guilt or innocence and that the duty of imposing sentence was the court's (R. 33–34). Petitioner's counsel took exception to these remarks, claiming that the judge should have merely said no to this inquiry (R. 34). The jury returned with a guilty verdict at 12:25 a.m. (R. 34–35).

ARGUMENT

Petitioner argues that the trial judge failed to clear up the juror's confusion as to the meaning of the word "obscene", in that the judge's subsequent explanations were merely restatements of his original instructions. However, as shown by the record, the trial judge took great pains to define, as clearly and as correctly as possible, the meaning of obscenity in accord with standards adopted by the Court in *Roth v. United States*, 354 U.S. 476. As petitioner acknowl-

edges, the original instructions were unexceptionable in this regard, closely paralleling the instructions approved in *Roth* (354 U.S. at 487, n. 20, 490). Moreover, when the jury indicated its desire for further elucidation, the trial judge patiently repeated these approved instructions, attempting further clarification by including additionally, at the suggestion of petitioner's counsel, the precise language used in the *Roth* opinion. Only when the jury appeared satisfactorily to understand this definition, did the trial judge permit them to withdraw again and consider their verdict.

There is no merit to petitioner's further claim that the judge confused the jury by equating the term "obscene" with the term "filthy". As already noted, *supra*, p. 5, no objection had been taken to the original instructions defining this term which is included in the statute. And certainly the judge was quite correct in repeating all the judicially approved definitions of the terms used in the statute, upon the jury's request.

Apparently, petitioner is of the opinion that the trial judge was required to go beyond accepted criteria as to the meaning of obscenity and provide the jury with some formula which it could apply automatically to reach a decision. This, of course, is unattainable when dealing with obscenity. In *Roth*, the Court recognized that the term was not subject to precise mathematical definition (354 U.S. at 491-492). Nonetheless, it held that the reasonable standard developed in the case law through the years could be fairly applied by juries to condemn the prurient, while affording adequate protection to speech within

the purview of the First Amendment. This was the standard used here; and such was the result. As the Court of Appeals held: "Under *United States* v. *Roth*, 354 U.S. 476, the jury was entitled to find the dreary pornography here placed before it obscene * * *. The trial judge committed no error in repeating his proper and adequate definition of obscenity in response to the jury's question, * * *" (R. 153).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
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FEBRUARY 1959.

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